University of Richmond Law Review

Volume 38 | Issue 3 Article 7

3-1-2004

Legislative Restraint in the Confirmation Process

Kenneth W. Starr

LEGISLATIVE RESTRAINT IN THE CONFIRMATION PROCESS

The Honorable Kenneth W. Starr *

Thank you, President Sullivan,[1] Chief Justice Rehnquist,[2] Chief Justice Carrico, in whose honor we gather, Mrs. Carrico, Judge Wilkinson,[3] Mr. President,[4] and Dean.[5]

During the debates over ratification of the United States Constitution, Mr. Madison issued a warning. He issued a warning in *The Federalist* that there were numerous dangers to balanced government, which is what the architects of the Constitution believed they had created in the proposed government.[6] Madison further advised that the attack to balance was most likely to come from the legislative branch.[7]

---

* Partner, Kirkland & Ellis LLP, Washington, D.C. A.B., 1968, George Washington University; A.M., 1969, Brown University; J.D., 1973, Duke University. In August 1994, Judge Starr was appointed Independent Counsel on the Whitewater matter. From May 27, 1989 to January 20, 1993, Judge Starr served as Solicitor General of the United States. Prior to becoming Solicitor General, Judge Starr served on the United States Court of Appeals for the District of Columbia Circuit.

1. Timothy J. Sullivan is the President of the College of William and Mary and the former dean of the Marshall-Wythe School of Law at William and Mary.

2. The Honorable William H. Rehnquist is the Chief Justice of the Supreme Court of the United States.

3. The Honorable J. Harvie Wilkinson III is a judge on the United States Court of Appeals for the Fourth Circuit. Judge Wilkinson formerly served as Chief Judge of the Fourth Circuit from 1996 to 2003.

4. Dr. William E. Cooper is the president of the University of Richmond.

5. John R. Pagan is a professor of law at the University of Richmond School of Law. He formerly served as the dean of the law school from 1997 to July 2003.

6. *See* THE FEDERALIST NO. 48, at 332–38 (James Madison) (Jacob E. Cooke ed., 1977) (discussing the need for checks, balances, and general interrelation of the three branches of federal government in order to maintain separation of powers).

7. *See* THE FEDERALIST NO. 49, at 341 (James Madison) (Jacob E. Cooke ed., 1977) ("We have seen that the tendency of republican governments is to an aggrandizement of the legislative, at the expence of the other departments."); THE FEDERALIST NO. 51, at 350 (James Madison) (Jacob E. Cooke ed., 1977) ("In republican government the legislative authority, necessarily, predominates. . . . It may even be necessary to guard against dangerous encroachments by still further precautions.").

Everywhere, Mr. Madison wrote, the legislative branch is seeking to draw matters into its "vortex"[8]—what we would today simply call power-grabbing. Now, to be sure, as we have seen over the nation's history, excesses and abuses have occurred in the Article II[9] and even in the Article III[10] branches. And thus, a free people are ever wise to be vigilant for dangers to balanced government, wherever they may arise.

In keeping with Dr. Franklin's famous admonition and observation as he left the convention in Philadelphia and responded to the question of what sort of government have you given us, ours is "a republic . . . if you can keep it."[11] In keeping with the happy occasion that brings us together in honor of Virginia's Chief Justice, let me add modestly to Dr. Franklin's description that ours is a federal republic.

This is not France, and I mean no disrespect by saying it. Our nation is not, and was not intended to be, a centralized republic. That structural truth has been conveyed time and again, but especially over the last decade, by our Supreme Court, and I believe wisely so.

And so it is that in reflecting on the judicial role and the role of independence, we are wise to be attuned to the ever-present danger, articulated by Madison, of legislative intrusions, attacks, and incursions that can have the effect of eroding the bedrock principle of independence of the judiciary.

Judicial independence is a large subject. It summons up powerful feelings of the uniqueness of the judicial role. We conjure up in our minds images of Holmes's dissents, sometimes joined by Brandeis, or Learned Hand's elegant tributes to this feature of the constitutional republic—that judging is not to be politics simply by other means.

This means a struggle within the judicial mind—a continuing one, as every current and former judge knows. The challenge is to be self-disciplined, to look for decisional sources and materials that are understood and identifiable, and to treat those materials,

---

8. THE FEDERALIST NO. 48, *supra* note 6, at 333.

9. U.S. CONST. art. II (establishing the Executive branch).

10. U.S. CONST. art. III (establishing the Judicial branch).

11. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 app. A, at 85 (Max Farrand ed., 1911).

including the materials of history, with respect and integrity. These are not necessarily the means or mechanisms of politics, and thus they are removed by structural design from the processes of the political branches.

These two worlds, that of the judicial process and law on the one hand, and that of politics and legislating upon the other, most visibly clash, not only in the exercise of the bedrock power of judicial review, but also in the process of advice and consent. We have come to know it as the confirmation process. I have been asked to reflect briefly on that.

Are there principles that can guide this increasingly stormy process when the judicial nominee climbs up that very tall hill called Capitol Hill and enters the confirmation world of the United States Senate? In review of our reflections this afternoon, what do these principles, if we can identify them, teach us about judicial independence?

Let me turn very briefly to the voices of three sitting members of the Supreme Court of the United States. In his confirmation hearings in 1987, Justice Kennedy said this in resisting answering a series of questions:

> I think if a judge decides a case because he or she is committed to a result, it destroys confidence in the legal system.
>
> Senators and Representatives are completely free to vote for a particular bill because it favors labor, or because it favors business. That is the way politics works, and that is your prerogative. To identify such an interest, it seems to me, is very candid.
>
> That is improper for a court. The court must base its decision on neutral principles applicable to all parties. That is inconsistent, in my view, with deciding a case because it reaches a particular result.[12]

Or consider Justice Souter's testimony in the early 1990s:

> Is there anyone who has not, at some point, made up his mind on some subject and then later found reason to change or modify it? No one has failed to have that experience.

---

12. *Nomination of Anthony M. Kennedy to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong. 144 (1987) (statement of Anthony M. Kennedy, Nominee, Associate Justice of the Supreme Court of the United States).

> No one has also failed to know that it is much easier to modify an opinion if one has not already stated it convincingly to someone else.
>
> With that in mind, can you [Senators] imagine the pressure that would be on a judge who has stated an opinion, or seemed to have given a commitment in these circumstances to the Senate of the United States, and for all practical purposes, to the American people?
>
> You understand the compromise that that would place upon the judicial capacity and that is my reason for having to draw the line.[13]

Or Justice Breyer in 1994:

> Let us imagine, if I am lucky and if you find me qualified and vote to confirm me, I will be a member of the Supreme Court, and, as a member of that Court, I will consider with an open mind the cases that arise in that Court. And there is nothing more important to a judge than to have an open mind and to listen carefully to the arguments.
>
> . . . I do not want to predict or commit myself on an open issue that I feel is going to come up in the Court. The reason for that is two, there are two real reasons.
>
> The first real reason is how often it is when we express ourselves casually or express ourselves without thorough briefing and thorough thought about a matter that I or some other judge might make a mistake. . . .
>
> The other reason, which is equally important, is if you were a lawyer or if I was a lawyer or any of us appearing before a court or a client, it is so important that the clients and the lawyers understand the judges are really open-minded. [14]

These are the voices of the judicial perspective in the crucible of confirmation. Confirmation hearings, as we witness from time to time, build enormous hydraulic pressure. And historically, as we have heard from these voices, there has been resistance by nominees to answering specific questions. A specific example, which I eyewitnessed, was that of Justice Sandra Day O'Connor

---

13. *Nomination of David H. Souter to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong. 194 (1990) (statement of David H. Souter, Nominee, Associate Justice of the Supreme Court of the United States).

14. *Nomination of Stephen G. Breyer to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 103d Cong. 114 (1994) (statement of Stephen G. Breyer, Nominee, Associate Justice of the Supreme Court of the United States).

in 1981. Less than a decade had passed since the decision in *Roe v. Wade*.[15] She was pressed by two United States Senators to opine on that particular case.

At that time, a very substantial majority in the Senate and both parties agreed that this was unwise.[16] The Senators had the power to ask the questions, but it would have been better and more prudent to show restraint in the questions being asked. Then-Judge O'Connor was wise to be prudent and cautious in not providing an answer. The underlying premise, of course, is that questioning can intrude, even for the best of reasons and motives, into this bedrock value of independence.

Years ago, as a very young judge newly installed and just learning my way around and beginning to try to learn the judicial craft, I had an observation from a considerably more experienced judge, soon to be the chief judge of the court on which I was privileged to serve. He said, "Ken, you know that you are a judge exercising your constitutional independence when your conscience leads you to vote against the people who appointed you"—an interesting test of independence.

The controversy suggests the need for judicial modesty and judicial restraint. We see that in various areas because it is these areas that give rise to these issues that become so stormy in confirmation. The attitude of modesty or restraint is captured beautifully in Gerald Gunther's marvelous biography of Learned Hand, in which he stated that, "[h]is stance was modesty; his philosophy, that of a skeptical democrat and experienced judge, doubting the courts' competence to decide the problems of public policy that tend to come before them under our Constitution, worried lest judicial interventions undermine the maturing of democratic processes"—the wise use of independence.[17]

Was that a failure of will on Learned Hand's part? Was it an unwillingness to live up to the responsibility of judicial review and not having a more robust attitude toward his role as an independent judge? I don't think so. Perhaps there will be disagree-

---

15. 410 U.S. 113 (1973).

16. Memorandum from Grover Rees III, Counsel, Subcommittee on Separation of Powers, to Subcommittee on Separation of Powers (Sept. 1, 1981) (discussing the proper scope of questioning of Supreme Court nominees at Senate Advice and Consent Hearings).

17. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 655 (1994).

ment about that. But it is rather in the highest of our traditions of taking fully into account the supremacy of the Constitution and allowing self-government as a way to protect independence. This is, in short, a vision of order and lawful independence—a value that is of immeasurable worth in a constitutional democracy.

Perhaps as the confirmation process from time to time seems to spiral downward, it would be useful to be reminded that it has not always been thus, but there have been times, including in the recent past, when voices of restraint in the process of confirmation have been deeply respected by the world's greatest deliberative body.

Thank you.